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## CHAPTER ...

### **Freedom of expression, blasphemy and religious hatred: a view from the UK**

*Erica Howard*

#### I Introduction: current situation

In the UK, blasphemy and blasphemous libel were common law offences,<sup>1</sup> which meant that they were not laid down in statute, but were grounded in case law. The offences were officially abolished for England and Wales in May 2008, by Section 79 of the Criminal Justice and Immigration Act 2008. In Scotland and Northern Ireland, the offences still exist, although the last prosecution for blasphemy in Scotland was in 1843 and there have never been any prosecutions in Northern Ireland.

In 2006, the Racial and Religious Hatred Act 2006 was adopted and this Act added a new Part 3A to the Public Order Act 1986, entitled ‘Hatred against persons on religious grounds’, adding Sections 29A to 29N to the 1986 Act. The first section, Section 29A, defines ‘religious hatred’ as meaning ‘hatred against a group of persons defined by reference to religious belief or lack of religious belief’. The Public Order Act 1986 already contained provisions against racial hatred, which are different from those against religious hatred.

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<sup>1</sup> Blasphemous libel is the written form of blasphemy. See Law Commission, *Offences against Religion and Public Worship* (LAW COM. No 145), 18 June 1985, available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/235882/0442.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/235882/0442.pdf), para. 2.1.

There are also provisions on racially and religiously aggravated offences. The former were laid down in Sections 28 of the Crime and Disorder Act 1998, which was amended in December 2001, after the events on 11 September 2001, to include offence committed on religious grounds. Section 28(5) determines that ‘in this section “religious group” means a group of persons defined by reference to religious belief or lack of religious belief’. This means that, if there is religious hostility, the courts can impose a penalty above the ordinary maximum for the offence.

In this chapter, these provisions and the history that led to the abolition of blasphemy and blasphemous libel and to the enactment of the Racial and Religious Hatred Act 2006 will be examined. But what is the difference between blasphemy and religious hatred? Leigh writes that ‘the essence of blasphemy is showing contempt or insult to God or anything considered sacred’.<sup>2</sup> He distinguishes this from religious insult, which focuses on insulting those who belong to a specific religion or their religious feelings and from religious hatred, which ‘is a stronger form of conduct that may or may not be accompanied by intention to promote discrimination or violence against members of a religion’.<sup>3</sup> So, as Leigh sums up, ‘in principle blasphemy protects religious ideas per se whereas religious insults and religious hatred protect the persons holding religious beliefs’.<sup>4</sup> With this in mind, the different provisions in the UK are analysed.

## II Blasphemy: status of the offence before abolition

Blasphemy (and blasphemous libel) was a common law offence going back many centuries.<sup>5</sup> In 2002, a House of Lords Select Committee was asked to consider and report on the law relating to religious offences. This Committee examined whether the existing religious offences (notably blasphemy) should be amended or abolished and whether a new offence of incitement to religious hatred should be created and, if so, how such an offence should be defined.<sup>6</sup> The report discussed the offence of blasphemy and stated that this offence was

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<sup>2</sup> Ian Leigh, ‘Damned if they do, damned if they don’t: the European Court of Human Rights and the protection of religion from attack’ (2011) 17:1 *Res Publica* 57.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Ibid.*

<sup>5</sup> For the history of the offence, see the Chapter by Mark Hill and Russell Sandberg in this volume.

<sup>6</sup> See the report *Select Committee on Religious Offences in England and Wales*, Session 2002-03, HL Paper 95-I, 5.

based on the idea that faith influenced society's political and moral behaviour and thus that challenges to that faith were serious threats to the fabric of society and had to be punished severely.<sup>7</sup> In other words, blasphemy was seen as 'akin to treason'.<sup>8</sup>

From 1838, the law of blasphemy only protected the beliefs of the Church of England.<sup>9</sup> Other Christian denominations appeared to be protected insofar as their beliefs overlapped with those of the Church of England.<sup>10</sup> Moreover, the law only prohibited material which was couched in indecent or offensive terms which was clear from *Bowman*, where the House of Lords confirmed that blasphemy required intemperate or scurrilous language.<sup>11</sup> Therefore, reasonable criticism was not considered blasphemous<sup>12</sup> and 'if the decencies of controversy are observed, even the fundamentals of religion might be attacked'.<sup>13</sup>

The offence of blasphemy was a so-called 'strict liability' offence: it did not require proof of intent to blaspheme, only proof of intent to publish. So it was sufficient for the prosecution to prove that the publication had been intentional and that the matter published was blasphemous. This was confirmed by the House of Lords in *R v. Lemon*, *R v. Gay News*,<sup>14</sup> a case which will be discussed in more detail below (see this section).

There were only four reported judgments in the twentieth century and no blasphemy case was prosecuted in England and Wales following the passage of the Human Rights Act 1998.<sup>15</sup> This Act incorporated the European Convention on Human Rights and Fundamental Freedoms (ECHR) into domestic law. Since the coming into force of this Act in October 2000, the rights laid down in the ECHR can be invoked directly in the domestic courts.

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<sup>7</sup> Ibid., 46. See also *R v. Taylor* (1676) 1 Vent 293.

<sup>8</sup> Russell Sandberg and Norman Doe, 'The strange death of blasphemy' (2008) 71:6 *Modern Law Review* 972.

<sup>9</sup> *Gathercole's Case* (1838) 2 Lewin 237.

<sup>10</sup> *Williams* (1797) 26 St Tr 654. See also Mark Hill and Russell Sandberg, 'Blasphemy and Human Rights: An English Experience in a European Court', (2009) IV *Derecho y Religion* 145-160, 148 and the chapter by the same authors in this volume, where the authors mention that judicial pronouncements on this were becoming increasingly contradictory.

<sup>11</sup> *Bowman v. Secular Society Ltd* [1917] AC 406.

<sup>12</sup> Sandberg and Doe, 'The strange death of blasphemy' 972. See also House of Lords Select Committee, 47, para. 6.

<sup>13</sup> *R v. Ramsay and Foote* (1883) 15 Cox CC 231, as cited in Sandberg and Doe, 'The strange death of Blasphemy' 973.

<sup>14</sup> *R v. Lemon*, *R v. Gay News Ltd* [1979] AC 617.

<sup>15</sup> House of Lords Select Committee, 46, para. 3.

The first of these four cases, *Bowman*, confirmed, as already mentioned, previous case law, while, in 1922, *R v. Gott* was the last case that led to a person being imprisoned for blasphemy.<sup>16</sup> Between 1922 and 1977, there were no prosecutions, although the offence was ‘policed extra-legally; it was curtailed by the fears, anxieties and sensitivities of individuals rather than by law’.<sup>17</sup>

In 1977, a private prosecution was brought against both the editor and the publishers of the journal ‘Gay News’ concerning a publication of a poem entitled ‘The love that dares to speak its name’ which described sexual acts between Christ and his disciples and other persons and with Christ’s body immediately after his death.<sup>18</sup> Both editor and publishers were convicted of blasphemous libel. The House of Lords confirmed, as mentioned, that intent to publish is necessary for the offence, but that it is not necessary to prove intent to blaspheme. In relation to human rights as guaranteed by the ECHR, Lord Scarman considered that Article 9 ECHR (guaranteeing the freedom of religion as well as the freedom to manifest one’s religion) by necessary implication ‘imposes a duty on all of us to refrain from insulting or outraging the religious feelings of others’. In relation to Article 10 (guaranteeing freedom of expression) he mentioned that the exercise of this freedom carries with it duties and responsibilities and may be subject to restrictions. His conclusion was that ‘it would be intolerable if by allowing an author or publisher to plead the excellence of his motives and the right of free speech he could evade the penalties of the law even though his words were blasphemous in the sense of constituting an outrage upon the religious feelings of his fellow citizens’.<sup>19</sup> This suggests that the law of blasphemy was held to be compatible with the ECHR.

This was confirmed when the case went to Strasbourg. In *Gay News v. the United Kingdom*,<sup>20</sup> the European Commission of Human Rights held that the application was manifestly ill-founded and declared the application inadmissible. The Commission held that the restriction on the freedom of expression in order to protect religious feelings was justified

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<sup>16</sup> *R v. Gott* (1922) 16 CR App R 87.

<sup>17</sup> Sandberg and Doe, ‘The strange death of blasphemy’ 974. See also the Chapter by Hill and Sandberg in this volume.

<sup>18</sup> *R v. Lemon, R v. Gay News Ltd* [1979] AC 617.

<sup>19</sup> *Ibid.*, 664.

<sup>20</sup> *Gay News v the United Kingdom*, App. No. 8710/79 (1983) 5 EHRR 123.

under Article 10(2) ECHR.<sup>21</sup> The complaint of a violation of Article 9 ECHR was rejected on the same grounds, while the claim under Article 14 (guaranteeing non-discrimination in the enjoyment of the rights and freedoms in the ECHR) was dismissed because ‘there is no evidence that the applicants were discriminated against on account of their homosexual views or of beliefs not shared by confessing Christians’.<sup>22</sup> The Commission also held that ‘the applicants cannot complain of discrimination because the law of blasphemy protects only the Christian but no other religion. This distinction in fact relates to the object of legal protection, but not to the personal status of the offender’.<sup>23</sup>

Since the *Gay News* case, there have not been any successful prosecutions for blasphemy or blasphemous libel. In 1989, Salman Rushdie’s book ‘The Satanic Verses’ was published and the publication led to protests by British Muslims, who tried to bring a private prosecution against the author for blasphemy. But this was refused on the grounds that the offence only protects the Christian religion and there was no justification for a court to extend this, as this was a question for Parliament to decide. It was also mentioned that the fact that blasphemy did not apply to Islam did not mean that the UK was in breach of its responsibilities under the ECHR.<sup>24</sup> An application to the European Court of Human Rights for a violation of Article 9 and 14 was declared inadmissible because ‘no State authority, or any body for which the United Kingdom Government may be responsible under the Convention, directly interfered in the applicant’s freedom to manifest his religion or belief’.<sup>25</sup>

Although, in the *Gay News* case, the prosecution for blasphemy was successful, when the poem was recited publicly in 2002 to celebrate the 25<sup>th</sup> anniversary of its first appearance there was no action taken by the authorities.<sup>26</sup> Garcia Oliva writes that this made the fragility of the blasphemy offence obvious.<sup>27</sup>

*Wingrove v. the United Kingdom* was another challenge to the law of blasphemy before the European Court of Human Rights,<sup>28</sup> although this case did not concern a

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<sup>21</sup> Ibid, paras 2 and 12.

<sup>22</sup> Ibid, para. 4.

<sup>23</sup> Ibid, para. 14.

<sup>24</sup> *R v Chief Stipendiary Magistrate, ex parte Choudhury* [1991] 1QB 429.

<sup>25</sup> *Choudhury v. the United Kingdom*, Application no. 17439/90 (1991) 12 HRLJ 172.

<sup>26</sup> See also: Hill and Sandberg, in this volume.

<sup>27</sup> Javier. Garcia Oliva, ‘The legal protection of believers and beliefs in the United Kingdom’, (2007) 9:1 *Ecclesiastical Law Journal* 72.

<sup>28</sup> *Wingrove v. the United Kingdom*, App. No. 17419/90 (1997) 24 EHRR 1.

prosecution for blasphemy but rather a refusal by the British Board of Film Classification to issue a classification certificate for the video film 'Visions of Ecstasy' because it might well be regarded as blasphemous. The film was based on the writings of Saint Teresa de Avila, who had experienced powerful ecstatic visions of Jesus Christ. The maker of the film complained of a violation of his right to freedom of expression but the European Court of Human Rights concluded that Article 10 was not violated. The refusal was intended to protect the right of citizens not to be insulted in their religious feelings and, it was proportionate to that aim. So, the blasphemy law was compliant with the ECHR.<sup>29</sup>

In 2005, the BBC transmission of 'Jerry Springer: the Opera' led to a large number of complaints, both before and after transmission. An attempt was made to bring a private prosecution for blasphemous libel against both the producer and the BBC.<sup>30</sup> The Magistrate's Court refused to issue a summons and the claimant applied to the High Court for judicial review of this decision. The High Court considered that 'it is apparent from the Claimant's own description of this work, confirmed by our own brief viewing of a recording of it, that its target is the tasteless "confessional" chat show, rather than the Christian religion'.<sup>31</sup> The Court then mentioned that the offence of blasphemy still existed and that the elements of the offence were, first, it must concern material that was contemptuous, reviling, scurrilous and/or ludicrous; second, the publication must endanger society or cause civil strife.<sup>32</sup> The Court held that the second requirement is 'consistent with the requirement in modern times that any such crime be compatible with Article 10(2) and considered (referring to *Wingrove*) that 'whilst the law of blasphemy may well be "consonant" with the right to freedom of thought and to manifest one's religion enshrined in Article 9 ... the Article 10(2) basis for the crime of blasphemous libel is best found, as it seems to us, in the risk of disorder amongst, and damage to, the community generally'.<sup>33</sup>

So, although there have been very few prosecutions in the twentieth century, *Green* suggested that the offence still existed. But had it become a dead letter? That is what Lord

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<sup>29</sup> See also Hill and Sandberg in this volume.

<sup>30</sup> See *R (on the application of Stephen Green) v. the City of Westminster Magistrate's Court* [2007] EWHC 2785. See on this case also Hill and Sandberg in this volume.

<sup>31</sup> *Ibid.*, para. 8.

<sup>32</sup> *Ibid.*, paras 10 and 11.

<sup>33</sup> *Ibid.*, para. 17.

Denning stated in 1949.<sup>34</sup> The House of Lords Select Committee considered that ‘any prosecution for blasphemy today ... is likely to fail on grounds either of discrimination or denial of the right to freedom of expression’,<sup>35</sup> which also suggests that it was a dead letter. On the other hand, Sandberg and Doe write that ‘the *Gay News* case showed that the blasphemy laws remained very much alive’<sup>36</sup> and that *Green* suggests that the offence ‘lay dormant rather than dead’.<sup>37</sup> Garcia Oliva, in a case comment on *Green*, writes that ‘the requirements of the offence are so unlikely to be met that its abolition seems to be the most reasonable way forward’.<sup>38</sup> So, what led to the abolition of the offence in 2008?

### III Background to abolition

Section 79 of the Criminal Justice and Immigration Act 2008 abolished the offences of blasphemy and blasphemous libel for England and Wales. In Scotland and Northern Ireland, the offences still exist.

In a report in 1985, the majority of the Law Commission recommended that the offence of blasphemy should be abolished without replacement,<sup>39</sup> while the minority favoured abolition but with replacement by a new, statutory offence.<sup>40</sup> The reasons given for abolishment were that the common law on blasphemy was uncertain to an unacceptable degree because the lack of clear definition of the offence; that it was undesirable to have a criminal offence of strict liability, where intent to publish but no intent to blaspheme was needed; and, ‘in the circumstances prevailing now in England and Wales, the limitation of the offence to the protection of Christianity and, it would seem, the tenets of the Church of England, cannot be justified’.<sup>41</sup>

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<sup>34</sup> Lord Alfred Denning, *Freedom under law – Hamlyn Lecture* (London: Stevens & Co, 1949), 46.

<sup>35</sup> House of Lords Select Committee, 48, para. 10.

<sup>36</sup> Sandberg and Doe, ‘The strange death of blasphemy’ 974. See also Hill and Sandberg in this volume.

<sup>37</sup> Sandberg and Doe, ‘The strange death of blasphemy’ 983.

<sup>38</sup> Javier Garcia Oliva, ‘Blasphemy and “Jerry Springer: the opera” – R. (on the application of Green) v City of Westminster Magistrates’ Court [2007] EWHC 2785 (Admin)’, (2008) 13:2 *Communications Law* 57.

<sup>39</sup> Law Commission, *Offences against religion and public worship*, para. 4.1.

<sup>40</sup> *Ibid.*, Note of dissent, para. 1.1.

<sup>41</sup> *Ibid.*, para. 2.18.



In 1995, a Blasphemy Abolition Bill, proposed by Lord Avebury, was debated in the House of Lords, but this Bill never became law.<sup>42</sup> In 2001, the then Home Secretary, David Blunkett, told the House of Commons, during the debates on the Anti-Terrorism, Crime and Security Bill, that the Government's position was that 'there is a good case for revising and, indeed, removing existing blasphemy law' and that 'there is no question of extending the blasphemy law to all other denominations and faiths'.<sup>43</sup> The fact that blasphemy laws only covered the Church of England and Christian denominations was criticised severely at the time and the proposed Anti-terrorism, Crime and Security Bill created an offence of religious hatred, but that part of the Act was not adopted.

In 2002, the Religious Offences Bill aimed to 'abolish the common law offence of blasphemy and certain other offences; and to create an offence of religious hatred', as the Bill set out, but again, this Bill was not adopted.<sup>44</sup> The earlier mentioned report of the House of Lords Select Committee on Religious Offences did not make any concrete recommendations about abolition and/or replacement, but the debates about this report in the House of Lords show that opinions as to whether the offence should be abolished were divided.<sup>45</sup>

Finally, during the passage of the Racial and Religious Hatred Bill, abolition was again debated but this was voted down by the House of Lords.<sup>46</sup> So abolition of the offence of blasphemy has been debated on a number of occasions but this did not lead to actual abolition until 2008.

#### IV Developments contributing to abolition

Sandberg and Doe distinguish five important developments that influenced the eventual abolition of the offences by the Criminal Justice and Immigration Act 2008: the decision of the Supreme Court of Ireland that a prosecution for blasphemy could not succeed there; the work of the House of Lords Select Committee on Religious Offences in England and Wales;

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<sup>42</sup> See <http://hansard.millbanksystems.com/lords/1995/jan/10/blasphemy-abolition-bill-hl> and <http://hansard.millbanksystems.com/lords/1995/feb/22/blasphemy-abolition-bill-hl>.

<sup>43</sup> David Blunkett, HC Deb Column 707-708, 26 November 2001, available at [http://www.publications.parliament.uk/pa/cm200102/cmhansrd/vo011126/debtext/11126-17.htm#11126-17\\_spnew5](http://www.publications.parliament.uk/pa/cm200102/cmhansrd/vo011126/debtext/11126-17.htm#11126-17_spnew5) For the Bill see: <http://www.publications.parliament.uk/pa/cm200102/cmbills/049/2002049.pdf>.

<sup>44</sup> Bill available at <http://www.parliament.the-stationery-office.co.uk/pa/ld200102/ldbills/039/2002039.pdf>.

<sup>45</sup> See <http://hansard.millbanksystems.com/lords/2004/apr/22/religious-offences>.

<sup>46</sup> HL Deb Column 523, 528, 532-533, 535, 8 November 2005, available at <http://www.publications.parliament.uk/pa/ld200506/ldhansrd/vo051108/text/51108-08.htm>.

the enactment of the Racial and Religious Hatred Act 2006; the *Green* case; and, the Parliamentary history leading to abolition of the offence.<sup>47</sup> As these five developments clearly illustrate the forces behind abolition, they will be discussed here.

A. *Corway v. Independent Newspapers (Ireland) Ltd*

The first development was a decision of the Irish Supreme Court about the publication in a national newspaper of a cartoon concerning the influence of the Catholic Church in Ireland. According to the applicant, this cartoon treated the sacrament of the Eucharist and its administration as objects of scorn and derision.<sup>48</sup> The Supreme Court held that a prosecution for blasphemy could not succeed in Ireland because, firstly, it was questionable whether Article 40 of the Irish Constitution, which determines that ‘the publication or utterance of blasphemous ... matter is an offence which shall be punishable in accordance with law’, was compatible with the freedom of religion also guaranteed by the Constitution.<sup>49</sup> Secondly, in English law the offence of blasphemy only protected the established Church, the Church of England, but the Church of Ireland had been disestablished in 1869 and thus the common law offence could not survive in such a different constitutional framework.<sup>50</sup> The third reason was legal uncertainty: there was no definition of the offence.<sup>51</sup>

Sandberg and Doe question all three arguments.<sup>52</sup> According to them, the first and third arguments contradict the case law of the European Court of Human Rights that blasphemy laws do not breach Article 9 ECHR or the legal certainty requirements of Article 7 ECHR. However, this ignores the fact that the Irish Supreme Court found that the offence was not compatible with the Irish Constitutional guarantee of freedom of religion. This guarantee might be interpreted differently from Article 9 ECHR. The second reason seems to Sandberg and Doe to be incorrect in law, because blasphemy protects not only the Church of England but also other Christian religions and the disestablishment of the Church of Ireland is thus as irrelevant as the disestablishment of the Church of Wales (in 1914).<sup>53</sup> However, it was

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<sup>47</sup> Sandberg and Doe, ‘The strange death of blasphemy’ 976.

<sup>48</sup> *Corway v. Independent Newspapers (Ireland) Ltd* [1999] 4 IR 485.

<sup>49</sup> *Ibid.*, para. 35

<sup>50</sup> *Ibid.*

<sup>51</sup> *Ibid.*, para. 38.

<sup>52</sup> Sandberg and Doe, ‘The strange death of blasphemy’ 977-978.

<sup>53</sup> *Ibid.*

already mentioned that Hill and Sandberg write that the case law was not clear as to whether the offence of blasphemy protected other Christian denominations or not.<sup>54</sup>

Opinions about the compatibility of the laws of blasphemy with the ECHR are divided. Hare, for example, writes that the uncertainty and the breadth of the offence pose a serious threat to free speech.<sup>55</sup> Goodall writes that, although the matter is not settled, the English law on blasphemy seems to be incompatible with the ECHR.<sup>56</sup> And, Lester also appears to have understood the decision of the Irish Supreme Court in a very different way as he writes: ‘I believe that, if a suitable case were now to come before the courts, the UK Law Lords would overrule previous case law upholding the offence of blasphemy [referring to the *Gay News* case] and would find persuasive the Irish Supreme Court’s decision holding that blasphemous libel is so lacking in legal certainty that it is no longer an enforceable criminal offence’.<sup>57</sup> So opinions are divided as to the compatibility of the English law of blasphemy with the ECHR and such laws certainly raise issues about freedom of religion and freedom of expression. We will come back to this in the next sections (see all sections below).

#### B. *House of Lords Select Committee on Religious Offences in England and Wales*

As mentioned, the 2003 report of the House of Lords Select Committee considered that ‘any prosecution for blasphemy today ... is likely to fail on grounds either of discrimination or denial of the right to freedom of expression’.<sup>58</sup> The Select Committee argued that the decision of the European Court of Human Rights in *Wingrove v the United Kingdom* ‘that there was not yet “sufficient common accord” to mean that the English law of blasphemy was in breach of the European Convention does not mean that it will not rule otherwise in the future’.<sup>59</sup>

Sandberg and Doe point out that this contention would, if taken to its logical conclusion, call into question every decision by the European Court of Human Rights, although they do admit that the Convention is a living instrument and that its interpretation

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<sup>54</sup> See chapter by Hill and Sandberg in this volume.

<sup>55</sup> Ivan Hare, ‘Blasphemy and incitement to religious hatred: free speech dogma and doctrine’, in Ivan Hare and James Weinstein (eds.), *Extreme speech and Democracy* (Oxford: Oxford University Press, 2009), 302.

<sup>56</sup> Kay Goodall, ‘Incitement to religious hatred: all talk and no substance?’, (2007) 70:1 *Modern Law Review* (2007) 105 and 107.

<sup>57</sup> Anthony Lester, *Free speech and religion – the eternal conflict in the age of selective modernization*, 12 May 2006, available at [http://www.odysseustrust.org/lectures/274\\_Hungarytalk.pdf](http://www.odysseustrust.org/lectures/274_Hungarytalk.pdf), 14-15.

<sup>58</sup> House of Lords Select Committee, 48, para. 10.

<sup>59</sup> *Ibid.*, para. 12.

can change over time.<sup>60</sup> However, authors ignore the fact that the *Wingrove v the United Kingdom* decision of the European Court of Human Rights was taken in 1997, now nearly 20 years ago, and that the decision that the law of blasphemy is compatible with the ECHR does not mean that signatory states must have such laws, nor that such laws are always compatible with the ECHR. Both the right to freedom of religion and the right to freedom of expression can be restricted when this is justified. To establish this, a balancing exercise takes place taking into account all the interests involved. This exercise is case-specific, so the European Court of Human Rights might come to a different conclusion in future cases.

Moreover, the Parliamentary Assembly of the Council of Europe has stated that ‘blasphemy laws should not be used to curtail freedom of expression and thought’ and that ‘freedom of expression as protected under Article 10 of the European Convention on Human Rights should not be further restricted to meet increasing sensitivities of certain religious groups’.<sup>61</sup> The Assembly has also considered that blasphemy should not be a criminal offence;<sup>62</sup> that blasphemy laws should be reviewed ‘in view of the greater diversity of religious beliefs in Europe and the democratic principle of the separation of state and religion’;<sup>63</sup> and, that ‘national law should only penalise expressions about religious matters which intentionally and severely disturb public order and call for public violence’.<sup>64</sup> All this suggests that, even within the Council of Europe, blasphemy laws are seen as raising serious issues in relation to freedom of religion and freedom of expression.

The House of Lords Select Committee also stated that there are other problems with the common law offences: the disproportionality of an unlimited penalty; discrimination in favour of Christianity alone; and the fact that there is no mechanism to take account of the proper balance to be struck under Article 10 ECHR.<sup>65</sup> Sandberg and Doe again criticise this as being contrary to case law from the European Court of Human Rights and from the English domestic courts.<sup>66</sup> However, the Select Committee itself points out that there is a

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<sup>60</sup> Sandberg and Doe, ‘The strange death of blasphemy’ 979.

<sup>61</sup> Parliamentary Assembly, Council of Europe, Resolution 1510 (2006) *Freedom of expression and respect for religious beliefs*, paras 3 and 12.

<sup>62</sup> Parliamentary Assembly, Council of Europe, Recommendation 1805 (2007) *Blasphemy, religious insults and hate speech against persons on grounds of their religion*, para. 4.

<sup>63</sup> *Ibid.*, para. 10.

<sup>64</sup> *Ibid.*, para. 15.

<sup>65</sup> House of Lords Select Committee, 49, para. 15.

<sup>66</sup> Sandberg and Doe, ‘The strange death of blasphemy’ 979.

difference between the domestic courts and the European Court of Human Rights in applying the ECHR because the domestic court cannot rely on the margin of appreciation.<sup>67</sup> And, as pointed out above, opinions are divided about whether blasphemy offences are compatible with the ECHR.

### C. *Racial and Religious Hatred Act 2006*

The third development which played a role on the road to the abolition of the blasphemy offence was the enactment of the Racial and Religious Hatred Act 2006. This is discussed in the part on alternative offences below (see section V).

### D. *Jerry Springer: the opera*

The fourth development on the road to abolition of the offence of blasphemy is the High Court decision in *Green* concerning ‘Jerry Springer: the Opera’, discussed before, which made clear that the offence still existed and did not breach the ECHR.<sup>68</sup> Sandberg and Doe argue that this undermines the reasoning of the Irish Supreme Court, the House of Lords Select Committee and the debates in the House of Lords that blasphemy laws would not be compatible with the ECHR.<sup>69</sup> However, as mentioned above, there are also writers who do not agree that the blasphemy laws are compatible with the ECHR. Moreover, the fact that the compatibility with the rights to freedom of religion and freedom of expression was discussed by the Irish Supreme Court and in the debates in the House of Lords, also shows that there were a number of people who questioned this compatibility and that opinions were very much divided on this issue.

A more cogent rationale for abolishing the offence was, according to Sandberg and Doe, provided in the *Green* case: Section 2(4) of the Theatres Act 1968 prevented prosecution. This section determines that ‘no person shall be proceeded against in respect of a performance of a play or anything said or done in the course of such a performance (a) for an offence at common law where it is of the essence of the offence that the performance or, as the case may be, what was said or done was obscene, indecent, offensive, disgusting or injurious to morality ...’. The High Court held that this section was applicable to the offence

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<sup>67</sup> House of Lords Select Committee, 49, para. 15.

<sup>68</sup> *R (on the application of Stephen Green) v the City of Westminster Magistrate’s Court* [2007] EWHC 2785.

<sup>69</sup> Sandberg and Doe, ‘The strange death of blasphemy’ 981. Leigh makes the same point, see: Leigh, ‘Damned if they do, damned if they don’t’, 58-59.

of blasphemy. And, although the Theatres Act 1968 does not apply to broadcasts, there are identical provisions in the Broadcasting Act 1990, as Sandberg and Doe point out.<sup>70</sup> These authors express their surprise that the impact of the Theatres Act 1968 was previously ignored in the debate.<sup>71</sup>

In contrast to this, Hare writes that the outcome of the *Green* case ‘is even more surprising when the provisions of the Theatres Act and the Broadcasting Act are examined in context’.<sup>72</sup> He argues that both acts prohibit the performance of obscene plays and incorporate the test of a tendency to ‘deprave and corrupt’ from the Obscene Publications Act 1959 and that, looking at the legislative history, no mention was made of blasphemy. The provision, on which the Court in *Green* relied, thus relate to the common law of obscenity and were not meant to have an impact on the law of blasphemy.<sup>73</sup> Hare also finds it disappointing that the Court did not address the compatibility of the offence of blasphemy with the protection of free speech.<sup>74</sup> So here, again, an author expresses that the blasphemy laws could very well be incompatible with the ECHR.

Hare also writes that ‘the decision in *Green* is even more striking when one considers that the result of the decision cannot sensibly be confined to theatre and television’.<sup>75</sup> He argues that, under both domestic and European Court of Human Rights case law, the state can subject broadcasting to more rigorous restrictions than printed matter and, thus, if the state has found that restrictions on blasphemy are not necessary for broadcasting, it will be even more difficult to argue that they are necessary for the printed word. And, as Hare concludes, the *Green* case is ‘likely to have swept away the law of blasphemy in all areas except for face-to-face utterances between individuals. The Divisional Court [High Court] had thus almost fully achieved what the House of Lords said in *Lemon* [*Gay News*] was not possible by judicial decision’.<sup>76</sup>

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<sup>70</sup> Sandberg and Doe, ‘The strange death of blasphemy’ 982.

<sup>71</sup> Ibid.

<sup>72</sup> Hare, ‘Blasphemy and incitement to religious hatred: free speech dogma and doctrine’ 298.

<sup>73</sup> Ibid., 298-299.

<sup>74</sup> Ibid., 299.

<sup>75</sup> Ibid.

<sup>76</sup> Ibid.

### E. *Abolition of blasphemy*

The response to *Green* was legislative action. The Parliamentary history of Article 79(1) of the Criminal Justice and Immigration Act 2008 is the fifth development which influenced the abolition of blasphemy. In January 2008, Dr Evan Harris moved a new clause to the Criminal Justice and Immigration Bill to abolish ‘the ancient discriminatory, unnecessary, illiberal and non-human rights compliant offences of blasphemy and blasphemous libel’.<sup>77</sup> The offences were unnecessary, firstly, because there were enough laws dealing with public decency and public order offences to ensure that the abolition of the offences would not lead to widespread outrageous behaviour in public; and, secondly, ‘the Almighty does not need the protection of these ridiculous laws, which is why many people with a religious perspective share the view that these offences should be abolished’.<sup>78</sup> Harris explained that the offence is illiberal because of its uncertain scope and because it is a strict liability offence, so it is no defence that one did not intend to blasphemy. Because of this, one cannot know when one is committing the offence.<sup>79</sup> Furthermore, the penalty for the offence is unlimited and the offence is discriminatory because it only protects the Christian religion and the tenets of the Church of England. Because of this, the offence is incompatible with the ECHR and with British law, now it incorporates the Convention, according to Harris.<sup>80</sup> Later on in the debate, Harris pointed out that:

the offence is also divisive in terms of social cohesion, partly because it is discriminatory. The corollary of that is that it raises a sense of unfairness among other religions, particularly those whose adherents are more sensitive than adherents to the Christian faith—a sense that they are being singled out because they are not protected. It raises the expectation, which previous Governments may have sought to keep going, that they will be entitled to their own—Islamic, say—version of a blasphemy law. The best way in which to make clear to the communities and people of this nation that we do not expect there to be protection of beliefs, or indeed of

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77 HC Deb Column 442, 8 January 2008, available at <http://www.publications.parliament.uk/pa/cm200708/cmhansrd/cm080109/debtext/80109-0026.htm>.

78 Ibid. Column 443.

79 Ibid.

80 Ibid.

people's sensibilities about their beliefs, is to abolish the existing blasphemy offences, and that is one of the strongest arguments for so doing.<sup>81</sup>

Harris mentioned two more reasons for abolishing the offences: that the law on blasphemy has a 'chilling effect' because it could mean that people might avoid showing, publishing or printing material that might be blasphemous because they might be subject to criminal sanctions.<sup>82</sup> The final reason for proposing abolition was 'its impact on our ability to conduct our affairs in terms of international human rights and international relations, and to criticise other countries' uses of their blasphemy laws'.<sup>83</sup>

The Government agreed that it was time for Parliament to act because the offences had largely fallen into desuetude and appeared to be moribund.<sup>84</sup> However, they found it necessary to consult the Anglican Church and assured that this would be done quickly and that then the Government would bring forward proposals to abolish the blasphemy offences. Harris then withdrew his proposal.<sup>85</sup>

On 5 March 2008, an amendment to the Criminal Justice and Immigration Bill abolishing blasphemy was moved by the Government in the House of Lords. A number of reasons were given: 'first, the law has fallen into disuse and therefore runs the risk of bringing the law as a whole into disrepute. Secondly, we now have new legislation to protect individuals on the grounds of religion and belief'.<sup>86</sup> Third, 'it is crystal clear that the offences of blasphemy and blasphemous libel are unworkable in today's society because they do not protect the individual or groups of people, they do not protect our fundamental rights—indeed, they may conflict with them—and they do not protect the sacred'.<sup>87</sup> And, the fourth reason echoed what was said by Harris, that the UK could not challenge oppressive blasphemy laws in other countries as long as the law remained on the statute book.<sup>88</sup>

The Joint Committee on Human Rights reported on the Bill and came to the conclusion that continuing to have offences of blasphemy and blasphemous libel could no

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<sup>81</sup> Ibid, Column 444.

<sup>82</sup> Ibid, Column 445.

<sup>83</sup> Ibid, Column 448.

<sup>84</sup> Ibid, Column 453.

<sup>85</sup> Ibid, Column 454.

<sup>86</sup> HL Deb Column 1118, 5 March 2008, available at <http://www.publications.parliament.uk/pa/ld200708/ldhansrd/text/80305-0005.htm>.

<sup>87</sup> Ibid., Column 1119.

<sup>88</sup> Ibid., Column 1121.



longer be justified. The Committee also said that it was confident that the English Courts under the Human Rights Act and the European Court of Human Rights under the ECHR would come to the same conclusion.<sup>89</sup> The amendment was passed by 148 votes to 87 in the House of Lords<sup>90</sup> and then by 378 votes to 57 in the House of Commons.<sup>91</sup> The Act came into force on 8 July 2008.

## V Alternative offences

As mentioned, one of the reasons given by the Government to abolish the blasphemy offences was that there was new legislation to protect individuals on the grounds of religion and belief. They were referring to the protection against discrimination and harassment on the ground of religion or belief under the Employment Equality (Religion and Belief) Regulations 2003<sup>92</sup> and to the Racial and Religious Hatred Act 2006, which, as its Section 1 says, ‘creates offences involving stirring up hatred against persons on religious grounds’. The Regulations did not create any criminal offences. The Racial and Religious Hatred Act 2006 added a new part 3A to the Public Order Act 1986. This part has the title ‘Hatred against persons on religious grounds’ and contains Sections 29A to 29N. The definition of ‘religious hatred’ can be found in Section 29A: ‘hatred against a group of persons defined by reference to religious belief or lack of religious belief’.

In the House of Lords debates on the proposal for abolition of the blasphemy offences, it was pointed out that, contrary to the offences of blasphemy and blasphemous libel, which do not protect individuals or groups from harm, the offence of incitement to religious hatred do provide this protection.<sup>93</sup> Moreover, whereas blasphemy only protects Christianity and the Church of England, those of other faiths and those of no faith are both protected by the new incitement provisions and, ‘this legislation recognises a more complex and diverse society, which respects those of faith and those of none’.<sup>94</sup>

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<sup>89</sup> Ibid., Column 1120.

<sup>90</sup> Ibid., Column 1147.

<sup>91</sup> See Sandberg and Doe, ‘The strange death of blasphemy’ 984.

<sup>92</sup> HL Deb Column 1147, 5 March 2008, available at <http://www.publications.parliament.uk/pa/ld200708/ldhansrd/text/80305-0009.htm>.

<sup>93</sup> HL Deb Column 1120, 5 March 2008, available at <http://www.publications.parliament.uk/pa/ld200708/ldhansrd/text/80305-0005.htm>.

<sup>94</sup> Ibid.

Part 3 of the Public Order Act 1986 already contained offences against stirring up racial hatred. Two previous Bills, the Anti-Terrorism, Crime and Security Bill in 2001<sup>95</sup> and the Serious Organised Crime and Police Bill in 2004-2005,<sup>96</sup> had attempted to extend the existing offence of racial hatred to include religious hatred, but neither of these attempts became law. According to paragraph 5 of the Explanatory Notes to the Racial and Religious Hatred Act 2006, 'this Act takes a different approach in that it creates a new part to the 1986 Act rather than extending the existing offence in Part 4 of the Act'.

Paragraph 4 of the Explanatory Notes to the Act explains that:

The new offences apply to the use of words or behaviour or display of written material (new section 29B), publishing or distributing written material (new section 29C), the public performance of a play (new section 29D), distributing, showing or playing a recording (new section 29E), broadcasting or including a programme in a programme service (new section 29F) and the possession of written materials or recordings with a view to display, publication, distribution or inclusion in a programme service (new section 29G). For each offence the words, behaviour, written material, recordings or programmes must be threatening and intended to stir up religious hatred.

This shows the three requirements for the offence: an act directed at a group; words behaviour, material or images which are threatening; and, an intention to stir up religious hatred.<sup>97</sup>

The final version of the Act was substantially different to the one that was originally proposed, mainly through a number of changes made in the House of Lords. The original proposal would have just added the offence of stirring up religious hatred to the existing offence of stirring up racial hatred.<sup>98</sup> One of the main arguments brought forward by supporters of the introduction of religious hatred provisions was that Jews and Sikhs were

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<sup>95</sup> For the Bill, see <http://www.publications.parliament.uk/pa/cm200102/cmbills/049/2002049.pdf>. The proposed changes can be found in Part 5.

<sup>96</sup> For the Bill, see <http://www.publications.parliament.uk/pa/cm200405/cmbills/005/2005005.pdf>. The proposed changes can be found in Section 119.

<sup>97</sup> Anthony Jeremy, 'Practical implications of the enactment of the Racial and Religious Hatred Act 2006', (2007) 9:2 *Ecclesiastical Law Journal* 188.

<sup>98</sup> Lester, Free speech and religion, 9.

covered by the prohibition of racial hatred, but Muslims, Hindus, Christians or those without a religion were not.<sup>99</sup>

The first change made by the House of Lords to the proposal was that the new offence of incitement to religious hatred got its own legislative provision, rather than just being added to the existing offence of incitement to racial hatred. The reason given was that opponents of the Bill in both Houses of Parliament disagreed with giving religious groups the same level of protection as racial groups because ‘a person’s religion is a matter of personal choice and could therefore be subject to criticism’.<sup>100</sup>

The wording of the offence of incitement to religious hatred was also changed. In the original proposal, the offence included words which were ‘abusive, insulting or threatening’, but ‘abusive’ and ‘insulting’ were dropped during the Bill’s passage through the House of Lords and now the wording needs to be ‘threatening’.<sup>101</sup> This means that ‘the Act now focuses more narrowly on words, behaviour or material that import threats of violence or the fear of violence’.<sup>102</sup>

Another change between the original proposal and the final enacted statute is that, in the final version, evidence of intention to stir up religious hatred is required and that it is not enough to show that the publication was likely to stir up such hatred. For the racial hatred offence, the publication must intent to stir up hatred or, alternatively, must be likely to do so.<sup>103</sup> The Post-legislative Scrutiny of the Act reports that the Crown Prosecution Service is of the view ‘that it is very difficult to prove a specific intent where the action(s) or speech may be ambiguous, or an isolated incident’.<sup>104</sup>

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<sup>99</sup> This was based on the fact that Jews and Sikhs had been held to be ethnic groups which qualified for the protection of the Race Relations Act 1976. See Memorandum to the Home Affairs Committee, Post-legislative scrutiny of the Racial and Religious Hatred Act 2006, CM 8164, 2011, para. 12. See also Garcia Oliva, ‘The legal protection of believers and beliefs in the United Kingdom’ 78.

<sup>100</sup> Memorandum to the Home Affairs Committee, 2011, para. 15. See on this distinction also Goodall, ‘Incitement to religious hatred: all talk and no substance?’ 97; Ivan Hare, ‘Crosses, crescents and sacred cows: criminalising incitement to religious hatred’, (2006) *Public Law* 534; and Lester, Free Speech and religion, 11.

<sup>101</sup> See Hare, ‘Blasphemy and incitement to religious hatred: free speech dogma and doctrine’ 296; and, Eric Barendt ‘Religious hatred laws: protecting groups or belief?’ (2011) 17:1 *Res Publica* 42.

<sup>102</sup> Jeremy, ‘Practical implications of the enactment of the Racial and Religious Hatred Act 2006’ 189.

<sup>103</sup> Barendt, ‘Religious hatred laws: protecting groups or belief?’ 42. See also Memorandum to the Home Affairs Committee, 2011, para. 17.

<sup>104</sup> Memorandum to the Home Affairs Committee, 2011, para. 18. See on the problems with proving intention also Goodall, ‘Incitement to religious hatred: all talk and no substance?’ 111-113.

But perhaps the most far-reaching change made by the House of Lords was the addition of a so-called ‘free speech clause’. As Goodall writes, ‘the most vociferous attacks on the Bill concerned freedom of expression’<sup>105</sup> and the addition of this clause was a response to that criticism. Article 29J of the Racial and Religious Hatred Act 2006, under the heading ‘Protection of freedom of expression’, reads:

Nothing in this Part shall be read or given effect in a way which prohibits or restricts discussion, criticism or expressions of antipathy, dislike, ridicule, insult or abuse of particular religions or the beliefs or practices of their adherents, or of any other belief system or the beliefs or practices of its adherents, or proselytising or urging adherents of a different religion or belief system to cease practising their religion or belief system.

Jeremy writes that Section 29J ‘expressly permits antipathy, dislike, ridicule, insult or abuse of a particular religion or belief system (or lack of religion or belief) and of practices of those who hold such beliefs’.<sup>106</sup> In the debates in the House of Lords on the Racial and Religious Hatred Bill, the question was asked:

what are the guarantees against the encroachment not only of religious thought police but also of self-censorship, which is perhaps the greatest expression of free expression in a liberal democracy? We have to face the fact that if we make it a criminal offence to stir up hatred against a group of people, then we create a climate within which people will think twice about even criticising it. In turn, people will surely run shy of saying anything that might stir up hatred of the ideology or religion itself and also develop a fear of being critical of it, satirising it or even poking the slightest fun at it.<sup>107</sup>

In the same debates, Lord Lester, who drafted the freedom of expression clause, recalled that Rowan Atkinson<sup>108</sup> had pointed out that the bill ‘promotes the idea that there should be a right not to be offended when the right to offend is far more important’.<sup>109</sup> Lord Lester

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<sup>105</sup> Goodall, ‘Incitement to religious hatred: all talk and no substance?’ 105.

<sup>106</sup> Jeremy, ‘Practical implications of the enactment of the Racial and Religious Hatred Act 2006’ 191.

<sup>107</sup> HL Deb, Column 1072-1073, 25 October 2005, available at [http://www.publications.parliament.uk/pa/ld200506/ldhansrd/vo051025/text/51025-04.htm#51025-04\\_head2](http://www.publications.parliament.uk/pa/ld200506/ldhansrd/vo051025/text/51025-04.htm#51025-04_head2).

<sup>108</sup> A comedian and actor who was one of the most vociferous opponents of the Bill because it stifled freedom of expression.

<sup>109</sup> HL Deb, Column 1074, 25 October 2005.

pointed out that the Bill, because of its overbreadth and vagueness, threatened to chill free expression and, that the proposed changes introduced safeguards ‘to prevent the new offences from sweeping too broadly and to deal with the chilling of free expression’.<sup>110</sup> Lord Lester came back to this later on where he mentioned ‘the chilling effects that such broad and vague offences would have on freedom of speech, discussion, debate and the free flow of opinions and information in whatever form’.<sup>111</sup> So the chilling effect of the Bill on free speech was stressed again and again during the debates in the House of Lords. The amendments were approved by the House of Commons by a majority of one and thus became part of the Act.

Lord Lester states that, because of the amendments he drafted ‘the Act strikes a sound balance between the interests of free speech and the need to protect religious groups from hatred and persecution’.<sup>112</sup> Many authors have pointed out that the four amendments to the original Bill have made it very difficult to prove the requirements for the offence and thus to secure a conviction under the Act. Both Barendt and Hare, for example, point out that, in practice, it may be impossible to bring prosecutions and that the Act might have only political effect.<sup>113</sup> Barendt calls the Act ‘an attempt by the Labour Government to placate the Muslim community, which, unlike Jews and Sikhs, is not protected by the racial hatred offence and which as a result felt itself treated less favourably than adherents of other religious faiths’,<sup>114</sup> while Hare calls the new law ‘a cynical sop to a vocal minority population who felt themselves to have been disproportionately the victim of recent Government initiatives on terrorism’.<sup>115</sup> Sandberg also calls the law ‘little more than political posturing; a simple statement that religious hatred is wrong’.<sup>116</sup> Finally, Jeremy puts this in a more positive way as he writes that the difficulties in proving the offence may suggest that the Act is essentially symbolic, but that the legislation serves an important purpose in supporting groups in society who are afraid for their safety and, by condemning bias, prejudice and hatred, the Act sends a

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<sup>110</sup> Ibid., Column 1075.

<sup>111</sup> Ibid., Column 1077.

<sup>112</sup> Lester, *Free Speech and religion*, 8.

<sup>113</sup> Barendt, ‘Religious hatred laws: protecting groups or belief?’ 43; and, Hare, ‘Blasphemy and incitement to religious hatred: free speech dogma and doctrine’ 310.

<sup>114</sup> Barendt, ‘Religious hatred laws: protecting groups or belief?’ 43. He points out that at the time of enactment of the Racial and Religious Hatred Act 2006, Christians, or at least members of the Church of England, were protected against intemperate attacks on their faiths through the offence of blasphemy.

<sup>115</sup> Hare, ‘Blasphemy and incitement to religious hatred: free speech dogma and doctrine’ 310.

<sup>116</sup> Russell Sandberg, *Law and religion* (Cambridge: Cambridge University Press, 2011) 144.

signal to potential offenders that such conduct will be punished severely.<sup>117</sup> So it is the declaratory or symbolic value of the Act, the fact that the Act makes a statement that religious hatred is wrong, which appears to be its most important value.

That the offence is indeed difficult to prosecute is confirmed by the Post-legislative Scrutiny which states that, if the success of the Racial and Religious Hatred Act 2006 was to be judged by the number of convictions it secured, then the act ‘has not been a successful piece of legislation’. It reports that:

There has been one successful conviction under the legislation, with a person convicted of an offence in relation to stirring up hatred against persons on religious grounds under Section 1 of the Act. Two other people have been arrested and charged with offences under the legislation, a prosecution was brought against the person in one case and they were acquitted of all charges at trial, and the charges were dropped against the person in the second case due to a technicality – however the investigation on this case remains ongoing.<sup>118</sup>

So there are difficulties in proving the new offence of incitement to religious hatred and there have been very few (successful) prosecutions to date. But how does this offence differ from the offence of blasphemy?

## VI Blasphemy and incitement to religious hatred offences compared

We have mentioned a number of issues that have been raised in relation to the offence of blasphemy. The first issue was that the offence was seen as discriminatory as it only covered the Church of England and other Christian religions. This was seen especially as a problem for Muslims. Sikhs and Jews were considered to be ethnic groups and thus covered by the protection against racial hatred, but Muslims were not. The offence of religious hatred has dealt with this problem as it covers all religions and also those without a religion. As was said

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<sup>117</sup> Jeremy, ‘Practical implications of the enactment of the Racial and Religious Hatred Act 2006’ 200.

<sup>118</sup> Memorandum to the Home Affairs Committee, 2011, para. 13. More information on this is given in paras 23 and 24, but the cases are not mentioned. For some cases after this Memorandum, see [http://www.cps.gov.uk/publications/prosecution/cases\\_of\\_inciting\\_racial\\_and\\_religious\\_hatred\\_and\\_hatred\\_based\\_upon\\_sexual\\_orientation.html](http://www.cps.gov.uk/publications/prosecution/cases_of_inciting_racial_and_religious_hatred_and_hatred_based_upon_sexual_orientation.html). Here two cases are mentioned: Bilal Ahmad (*R v. Ahmad(Bilal Zaheer)* [2012] EWCA Crim 959) and the case of Satinderbir Singh, Harjinder Singh Athwal, Damanpreet Singh, Parwinder Banning and Mehul Lodia, who were convicted at Leicester Crown Court on 6 February 2015, see on this latter case <http://www.itv.com/news/central/update/2015-02-06/six-men-jailed-for-part-in-hate-campaign/>.

in the debates in the House of Lords, ‘this legislation recognises a more complex and diverse society, which respects those of faith and those of none’.<sup>119</sup>

The second issue raised against the offence of blasphemy was that it was not clearly defined (as it was an offence established through case law rather than defined by statute) and that it was too broad and vague. It was also a strict liability offence in that it only required intent to publish not intent to blaspheme. Both were said to violate Article 7 of the ECHR. This has changed as the offence of incitement to religious hatred has been defined in law and requires proof of intent to stir up religious hatred.

The third major contention against the offence of blasphemy was that it was a violation of the rights to freedom of religion and expression. And, although the European Court of Human Rights has held that the English blasphemy laws were compatible with the Convention, this was an issue that came back again and again in the debates and in the literature and even featured in the Parliamentary Assembly of the Council of Europe. The new law on incitement to religious hatred now contains a freedom of speech clause, to deal with this issue of compatibility. The clause protects ‘freedom of expressions on religious matters, including vigorous criticism or abuse of particular religions, their dogma, and practices’.<sup>120</sup>

All this suggests that the offence of incitement to religious hatred would stand the test of compatibility with the ECHR better and that it would not be held to violate the ECHR by the European Court of Human Rights.

## VII Concluding remarks

This chapter has described the law and case law on blasphemy as it existed until 2008. The developments leading to the abolition of blasphemy in 2008 and the debates in both Houses of Parliament have been analysed. Apart from the fact that it had become a ‘dead letter’ or dormant law because it was seldom used in the 20<sup>th</sup> century, the major objections against the law on blasphemy were that it only protected the Christian religion; that the definition of the offence was unclear and that there was no requirement of intent to blaspheme, both of which

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<sup>119</sup> HL Deb Column 1120, 5 March 2008, available at <http://www.publications.parliament.uk/pa/ld200708/ldhansrd/text/80305-0005.htm>.

<sup>120</sup> Barendt, ‘Religious hatred laws: protecting groups or belief?’ 43.

made it difficult for people to know when they would break the law and this created legal uncertainty about a criminal law offence; and, that it was questionable whether the law was compatible with international human rights law, especially with Articles 7, 9, 10 and 14 of the ECHR. All of these issues appear to have been addressed and remedied by the Racial and Religious Hatred Act 2006, which created the offence on incitement to religious hatred. This Act and the important changes made to the original Bill by the House of Lords have been analysed and the conclusion was that the offence, although it deals with the issues raised against the laws on blasphemy and would most likely not be held to be incompatible with international human rights law, has created an offence which is extremely difficult to prosecute and might only have symbolic and political significance.

As in other countries, the Charlie Hebdo attack in Paris in January 2015, sparked a lot of discussions about freedom of speech in the UK,<sup>121</sup> but this does not appear to have led to calls for reintroducing the law of blasphemy. However, just days after the attack, the former Archbishop of Canterbury, Lord Carey, warned that Britain's fear of criticising Islam has led to a self-imposed blasphemy law. He said that 'a de facto blasphemy law is operating in Britain today. The fact is that publishers and newspapers live in fear of criticising Islam'.<sup>122</sup> He added that the Press should be encouraged to print controversial material, even if Muslims find it offensive. He also said that blasphemy laws were 'unjust and outdated'.<sup>123</sup> In November 2015, Labour MP Keith Vaz, speaking at a Muslim Council of Britain event on responses to terrorism and extremism, said that he had no problem with blasphemy laws being reintroduced in Britain, as long as they would apply equally to everyone. He actually stopped short of saying that such a law would be a good idea.<sup>124</sup>

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<sup>121</sup> See, for example <http://www.theguardian.com/commentisfree/2015/jan/10/charlie-hebdo-attack-free-speech-surveillance>; and <http://www.telegraph.co.uk/news/worldnews/europe/france/11331572/A-terrible-price-for-freedom-of-speech.html>.

<sup>122</sup> See 'Fear of Islam has given Britain self-imposed blasphemy laws, warns former archbishop Carey', Mail Online, 11 January 2015, available at <http://www.dailymail.co.uk/news/article-2905283/Fear-criticising-Islam-given-Britain-self-imposed-blasphemy-law-warns-former-archbishop-Carey.html>

<sup>123</sup> Ibid.

<sup>124</sup> See National Secular Society, *Labour MP Keith Vaz would have "no problem" with reintroduction of UK blasphemy laws*, available at <http://www.secularism.org.uk/news/2015/11/labour-mp-keith-vaz-would-have-no-problem-with-reintroduction-uk-blasphemy-laws>; *Bring back blasphemy laws, apply them equally to all faiths - Labour MP*, available at <https://www.rt.com/uk/322319-blasphemy-laws-freedom-expression/>; and *Audio: What Keith Vaz Actually said about UK blasphemy law*, available at <http://english.alarabiya.net/en/blog/2015/11/18/Audio-What-Keith-Vaz-actually-said-about-UK-blasphemy-law.html>.



It is submitted that the abolition of the blasphemy laws was a positive step and that the Racial and Religious Hatred Act 2006 has dealt with some of the issues raised about those laws. However, Lord Carey does raise an important point about the fear of criticising Islam. This echoes the fears during the debates about both blasphemy and the Racial and Religious Hatred Act 2006 about the chilling effect of such laws and about stifling criticism. Sandberg and Doe mention that during the period in the 20<sup>th</sup> century when there were no prosecutions for blasphemy, it was ‘policed extra-legally; it was curtailed by the fears, anxieties and sensitivities of individuals rather than by law’.<sup>125</sup> Goodall points to the fact that the Racial and Religious Hatred Act 2006 aims to deter.<sup>126</sup> The Post-legislative Scrutiny points out that the lack of prosecutions could be due to the preventative aspect of the law, which means that it is conceivable that the number of offences are limited because people moderate their language and behaviour to avoid prosecution.<sup>127</sup> But there is a fine line between convincing people to moderate their language and behaviour and restricting or stifling discussion and criticism of religions, their dogma, and the practices of their adherents. Opinion will always be divided as to where this line should be drawn. Therefore, it is submitted that restrictions on the freedom of expression, be it through blasphemy or incitement to religious hatred laws, should always be rigorously scrutinised by the domestic courts and by the European Court of Human Rights.

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<sup>125</sup> Sandberg and Doe, ‘The strange death of blasphemy’ 974. See also the Chapter by Hill and Sandberg in this volume.

<sup>126</sup> Goodall, ‘Incitement to religious hatred: all talk and no substance?’ 108.

<sup>127</sup> Memorandum to the Home Affairs Committee, para. 25.